85-886

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

DOMINIC F. BRUNO,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

RONALD E. CASSIDENTO, ESQ.
543 Prospect Avenue
West Hartford, CT 06105
(203) 233-5575

Counsel for the Petitioner

Printed By:
Brescia Stenographic Service
66 Connecticut Boulevard
East Hartford, CT 06108
525-6029

QUESTION PRESENTED

Whether the Connecticut Supreme Court erred in affirming the lower court's refusal to overturn Petitioner's conviction after finding an impairment of the Petitioner's Constitutional right to cross-examine the State's primary witness against him, by applying a harmless error test to this violation of his Sixth Amendment right to confrontation under the Constitution of the United States.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iv

QUESTION PRESENTED.....i

PETITION FOR WRIT OF CERTIORARI.....1

OPINION BELOW.....2

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....3

STATEMENT OF THE CASE.....7

REASONS FOR GRANTING THE WRIT.....11

ARGUMENT.....13

THE APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT AND TO CONDUCT AN EFFECTIVE CROSS EXAMINATION OF THE STATE'S PRIMARY WITNESS (TRACY JOHNSON AUSTIN) AGAINST HIM AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT THE WITNESS'S PSYCHIATRIC RECORDS WERE NOT MADE AVAILABLE TO HIS COUNSEL, AND THE TRIAL COURT REFUSED TO MAKE AN IN CAMERA INSPECTION OF THE SUBPOENAED RECORDS. THE APPELLATE COURTS ERRONEOUSLY APPLIED A 'HARMLESS ERROR' TEST TO THE VIOLATION OF THE APPELLANT'S BASIC CONSTITUTIONAL RIGHT OF CONFRON-

TABLE OF CONTENTS - CONT'D

Page

TATION - A RIGHT THAT GOES TO THE INTEGRITY OF THE FACT FINDING PROCESS OF DETERMINING GUILT OR INNOCENCE BY APPLYING THE HARMLESS ERROR TEST TO A DIRECT RESTRICTION ON THE SCOPE OF CROSS-EXAMINATION

CONCLUSION.....25

APPENDIX.....26

TABLE OF AUTHORITIES

CASES

Brookhart v. Janis, 384 U.S. 1 (1956)

Davis v. Alaska, 415 U.S. 308 (1974)

Green v. Wainwright, 634 F.2d (5th Cir. 1981)

Pointer v. Texas, 380 U.S. 400 (1965)

Smith v. Illinois, 390 U.S. 129 (1968)

State v. Brown, 552 S.W.2d 383 (Tenn. 1979)

State v. Bruno, 1 Conn. App. 384 (1984), aff'd State v. Bruno 197 Conn. 326 (1985)

State v. Esposito, 192 Conn. 166 (1984)

United States v. Bagley, 473 U.S. ___, 187 L. Ed.2d 481; 105 S. Ct. 3375 (1985)

United States v. Guilette, 404 F. Supp. 1360 (D. Conn. 1975)

United States v. Hiss, 88 F. Supp. 559 (S.D. N.Y. 1950)

United States v. Lindstrom, 688 F.2d (11th Cir. 1983)

United States v. Partin, 493 F.2d 750, 762-65 (5th Cir. 1974), cert. denied, 434 U.S. 903 (1977)

United States v. Society of Independent Gasoline Marketers, 624, F.2d 461, 465-69 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1980)

CONSTITUTIONAL PROVISIONS:

Sixth and Fourteenth Amendments to the United States Constitution

CONNECTICUT STATUTES:

§53a-48 Conspiracy. Renunciation as affirmative defense

§53a-189 Eavesdropping. Class D. felony

§53a-115 Criminal Mischief in the First Degree

FEDERAL STATUTE:

28 U.S.C. 1257 (3)

NO._____

IN THE

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OCTOBER TERM, 1985

DOMINIC F. BRUNO
Petitioner

v.

STATE OF CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE
STATE OF CONNECTICUT

TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES

The above-named Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court for the State of Connecticut entered in this proceeding on September 3, 1985, rehearing denied September 24, 1985.

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 197 Conn. 326 (September 3, 1985), and appears in the Petitioner's Appendix along with the Connecticut Supreme Court's Order dated September 24, 1985, denying rehearing.

JURISDICTION

The decision of the Connecticut Supreme Court was rendered on September 3, 1985 and a timely Motion for Rehearing was filed. An order denying a rehearing was issued on September 24, 1985. The Petition for Certiorari was filed within sixty (60) days of the denial of rehearing on September 24, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONNECTICUT GENERAL STATUTES

§53a-48. Conspiracy.
Renunciation as affirmative defense

(a) A person is guilty of conspiracy when, with intent

that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

(b) It shall be a defense to a charge of conspiracy that the actor, after, conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

§53a-115. Criminal mischief in the first degree: Class D felony.

(a) A person is guilty of criminal mischief in the first degree when:

(1) With intent to cause damage to tangible property of another and having no reasonable ground to believe that he has a right to do so, he damages tangible property of another in an amount exceeding one thousand five hundred dollars, or

(2) with intent to cause an interruption or impairment of service rendered to the public and having no reasonble ground to believe that he has a right to do so, he damages or tampers with tangible property of a utility or mode of public

transportation, power or communication, and thereby causes an interruption or impairment of service rendered to the public, or

(3) with intent to cause an interruption or impairment of service rendered to the public and having no reasonable ground to believe that he has a right to do so, he damages or tampers with any tangible property owned by any municipal corporation for fire alarm or police alarm purposes.

(b) Criminal mischief in the first degree is a class D felony. (1969, P.A. 828, §117, eff. Oct. 1, 1971; 1971, P.A. 871 §21.)

§53a-189 Eavesdropping: Class D felony.

(a) A person is guilty of eavesdropping when he unlawfully engages in wiretapping or mechanical overhearing of a conversation.

(b) Eavesdropping is a class D felony. (1969, P.A. 828, §191, eff. Oct. 1, 1971.)

FEDERAL STATUTE

28 U.S.C. 1257 (3):

By writ of certiorari, where the validity of a treaty or statute of the

United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE*

The Petitioner was tried in the Superior Court for the Judicial District of Litchfield, and on June 11, 1980 was found guilty in a trial to the court (Borden, J.) on three consolidated informations consisting of: two counts of eavesdropping in case #18-29892; four counts of eavesdropping and one count of conspiracy to commit eavesdropping in case #18-29935; and two counts of criminal mischief in the first degree in case #18-30069. The total effective sentence on the eavesdropping and conspiracy charges, which were imposed concurrently, was one year, execution suspended after six months, and two years pro-

*The reference to the record, transcript and exhibits refer to the printed record, transcripts and exhibits that are on file in the Connecticut Supreme Court under Docket Number 12510, State of Connecticut v. Dominic F. Bruno.

bation. The defendant was ordered to pay fines of one hundred and fifty dollars and three hundred and fifty dollars, respectively, on the criminal mischief charges (R. pp. 1-3, 7-12). The Appellate Court affirmed the convictions on March 13, 1984. State v. Bruno, 1 Conn. App. 384 (1984) and the Connecticut Supreme Court affirmed his convictions on September 3, 1985.

In the course of the trial, the Petitioner subpoenaed psychiatric records of the State's key witness (Tracy Johnson Austin) and made an Application For Permission To Review The Records Of The Hospitalization of Tracy Johnson a/k/a Tracy Austin (R. pp. 5-6). A Motion to Quash was filed by the hospital and joined in by the witness (Tracy Johnson Austin), which Motion to Quash was granted on May 13, 1980 by the

trial court (R. pp. 4-6) on the basis of a Connecticut statutory privilege protecting the confidentiality of psychiatric records. An appeal was filed, and the Appellate Court for the State of Connecticut denied the Petitioner's claim that his Constitutional rights to cross-examine the State's leading witness was violated by applying a "harmless error" test. State v. Bruno, 1 Conn. App. 384 (1984). The Connecticut Supreme Court agreed with the Connecticut Appellate Court that the Petitioner was impaired in his right to confront the witness against him. State v. Bruno 197 Conn. 330 (1985), but went on to apply a harmless error test to this basic constitutional right. Id. at 335-36.

The essence of the Petitioner's argument is that the right to confron-

tation in a criminal trial outweighs any statutorily created privilege of confidentiality surrounding psychiatric records. See, State v. Bruno, 1 Conn. App. 388-396 (1984). The trial court did not make and, in fact, refused to make an in camera inspection of the subpoenaed medical records. Id. at 389. The appellate courts found that the Petitioner had made a sufficient showing to reasonably believe that the failure to produce the records was likely to impair the Petitioner's rights to confront the witness (Tracy Johnson Austin) against him. The appellate courts further concluded that since the witness(Tracy Johnson Austin) did not consent to a release of the records to anyone, including the trial court, for an in camera inspection, the court should have stricken the witness's

testimony. State v. Bruno, 197 Conn. 326 at 335. and State v.Bruno, 1 Conn. App. at 395. However, after finding the Petitioner's basic constitutional right to confront a key witness had been impaired the Courts refused to reverse by applying a harmless error test.

REASONS FOR GRANTING THE WRIT

The decision rendered by the Connecticut Supreme Court concerning the denial of the Petitioner's right to confrontation is probably not in accord with the applicable decisions of this Court in United States v. Bagley, 473 U.S. ____; 87 L. Ed.2d 481, 105 S. Ct. 3375 (1985); Davis v. Alaska, 415 U.S. 308 (1974); Smith v. Illinois, 390 U.S. 129 (1968); Pointer v. Texas, 380 U.S. 400 (1969); Brookhart v. Janis, 384 U.S. 1 (1966). The Connecticut Supreme Court

committed constitutional error in affirming the trial court's refusal to allow defense counsel to fully cross-examine the State's chief witness against him after finding an impairment of his right to cross-examine the witness due to the withholding of her psychiatric records by the application of a harmless error test. There was a denial of the Petitioner's right to conduct a complete cross-examination when defense counsel was not allowed to fully cross-examine the witness and her testimony was not stricken. This abridgement of the Petitioner's cross-examination was in violation of his Fourteenth and Sixth Amendments right to confrontation, and necessitates a review by this Court.

ARGUMENT

THE APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT AND TO CONDUCT AN EFFECTIVE CROSS-EXAMINATION OF THE STATE'S PRIMARY WITWITNESS (TRACY JOHNSON AUSTIN) AGAINST HIM AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT THE WITNESS'S PSYCHIATRIC RECORDS WERE NOT MADE AVAILABLE TO HIS COUNSEL, AND THE TRIAL COURT REFUSED TO MAKE AN IN CAMERA INSPECTION OF THE SUBPOENAED RECORDS. THE APPELLATE COURTS ERRONEOUSLY APPLIED A 'HARMLESS ERROR' TEST TO THE VIOLATION OF THE APPELLANT'S BASIC CONSTITUTIONAL RIGHT OF CONFRONTATION - A RIGHT THAT GOES TO THE INTEGRITY OF THE FACT FINDING PROCESS OF DETERMINING GUILT OR INNOCENCE BY APPLYING THE HARMLESS ERROR TEST TO A DIRECT RESTRICTION ON THE SCOPE OF CROSS-EXAMINATION.

Connecticut expressly recognizes the right of an accused in a criminal prosecution to cross-examine the State's witnesses under both the Federal and State Constitutions. State v. Esposito, 192 Conn. 178 (1980). The Connecticut Supreme Court has held that "the right of cross examination is not a privilege,

but is an absolute right, and if one is deprived of a complete cross-examination, he has a right to have the testimony stricken". Id. at 179. In fact, the Connecticut Appellate Court found that the procedures outlined in State v. Esposito, supra were not followed by the trial court in the instant case, to wit: no in camera inspection was made, and therefore the witness (Tracy Johnson Austin) was not given the choice of consent to the release of the subpoenaed material or to face having her testimony stricken in the event of her refusal. State v. Esposito, supra at 179-180. The Application For Permission To Review The Records Of The Hospitalizations of Tracy Johnson a/k/a Tracy Austin was limited to relevant and recent hospitalizations (R. pp. 4-6).

This subpoena was marked as Hospi-

tal's Exhibit No. 1 (T. p. 8, 5/13/80). It asked for all medical and psychiatric records involving the psychiatric hospitalizations for 1979 and 1980 of Tracy Austin at the Charlotte Hungerford Hospital in Torrington, Connecticut (T. pp. 6-8, 5/13/80). The testimony revealed that the patient, Tracy Johnson Austin, had received psychiatric treatment for the period in question on two separate occasions (T. p. 9, 5/13/80). The first hospitalization occurred during the month of January, 1979 and the second hospitalization occurred in the month of April, 1979 (T. p. 11, 5/13/80). The witness, Tracy Johnson Austin, through her Attorney, claimed a privilege against disclosure for both the January and April records (T. p. 4 (5/13/80). It is significant and extremely relevant that the psychia-

tric hospitalizations took place in 1979 at the same time that she was key witness against the defendant, and within a year of her starring role in the trial. Therefore, the Petitioner's right to confrontation and to conduct an effective cross-examination were clearly denied him under State v. Esposito, supra; Davis v. Alaska, 415 U.S. 308 (1974); United States v. Lindstrom, 688 F.2d 1154 (11th Cir. 1983); and United States v. Guilette, 404 F.Supp. 1360(D. Conn. 1975). See also, Green v. Wainwright, 634 F.2d (5th Cir. 1981); United States v. Society of Independent Gasoline Marketers, 624 F.2d 461, 466-69 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1980); United States v. Partin, 493 F.2d 750, 762-65 (5th Cir. 1974), cert. denied, 434 U.S. 903 (1977) and United States v. Hiss, 88 F. Supp. 559

(S.D.N.Y. 1950).

A review of the transcripts on file and the briefs of the State and the Appellant in the Appellate Court lead to the inescapable conclusion that Tracy Johnson Austin, whose psychiatric records are at issue, was not only the original complainant, but was a vital witness in the three consolidated cases, and further, was the basis for the search warrant in all cases. She testified for at least eight days and her transcripts totaled 308 pages. Additionally, she had an ongoing relationship with most of the other witnesses, e.g., Cable Company employees. Furthermore, she in fact had a psychiatric history involving at least three hospitalizations, and said history was not remote from the time of the trial and was ongoing at the time of the

defendant's arrest and during the ensuing investigation.

Ms. Austin's claim that her psychiatric records should not be made available fly in the face of the decision of the Eleventh Circuit Court of Appeals in Lindstrom, supra. Lindstrom does not stand alone. Other relevant decisions permitting access to allegedly protected psychiatric records in order to effectively cross-examine a witness in the face of the claim of privilege are Green v. Wainwright, supra; United States v. Society of Independent Gasoline Marketers, supra; United States v. Partin, supra and United States v. Hiss, supra.

In the case of United States v.Lindstrom, 688 F.2d (11th Cir. 1983), the Court said at page 1160 that:

> Certain forms of mental disorder have high probative value on the issue of credibility. Although

the debate over the proper legal role of mental health professionals continues to rage, even those who would limit the availability of psychiatric evidence acknowledge that many types of 'emotional or mental defects may materially affect the accuracy of testimony; a conservative list of such defects would have to include the psychoses, most or all of the neuroses, defects in the structure of the nervous system, mental deficiency, alcoholism, drug addiction and psychopathic personality.' Juviler, Psychiatric Opinions as to the Credibility of Witnesses: A Suggested Approach, 48 Cal. L. Rev. 648, 649 (1960). Mental illness may tend to produce bias in a witness' testimony. A psychotic's veracity may be impaired by lack of capacity to observe, correllate or recollect actual events. A paranoid person may interpret a reality skewed by suspicions, antipathies or fantasies. A schizophrenic may have difficulty distinguishing fact from fantasy and may have his memory distorted by delusions, hallucinations and paranoid thinking. A paranoid schizophrenic, though he may appear normal and his judgment on matters outside his delusional system may remain intact, may harbor delusions of grandeur or persecution that grossly distort his reactions to events...

Lindstrom involved the denial of psychiatric records to the defense and is particularly appropriate to illustrate the Appellant's position. In quoting Lindstrom, supra, at 1667:

> The government strenuously argues that the privacy interest of a patient in the confidentiality of her medical records and the societal interest in encouraging free flow of information between patient and psychotherapist require affirmance of the trial court's rulings. While we recognize the general validity of those interests, they are not absolute and, in the context of this criminal trial, must 'yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case.' United States v. Society of Independent Gasoline Marketers of America, 624 F.2d at 469...
>
> Broad-brushed assertions of the societal interest in protecting the confidentiality of such information cannot justify the denial of the defendants' right to examine and use this psychiatric information to attach the credibility of a key government witness. A desire to spare a witness embarrassment which disclosure of medical records

> might entail is insufficient justification for withholding such records from criminal defendants on trial for their liberty. In Davis v. Alaska, 415 U.S. at 319, 94 S. Ct. at 1111, the Supreme Court rejected Alaska's attempt to utilize a similar confidentiality (the anonymity of a juvenile offender) to avoid confrontation and cross-examination...

Therefore, in light of the constitutional error involved, the "harmless error" doctrine should not have been applied by the Connecticut Appellate Court and the Connecticut Supreme Court.

The Petitioner respectfully submits that the "harmless error doctrine" is not applicable, due to the factual circumstances of Ms. Austin's involvement in all cases and counts and, furthermore, the "harmless error" test is not applicable to a basic constitutional right that goes to the integrity of the fact finding process of determining guilt or inno-

cence. In other words, the right to cross-examine is a basic constitutional right and cannot be subject to the application of the "harmless error" doctrine. See United States v. Bagley, 473 U.S.___; 87 L.Ed.2d 481; 105 S. Ct. 3377 (1985).

The Petitioner has a basic federal constitutional right involved in the instant case. It is well established that a state criminal accused has a right to confront opposing witnesses and to conduct a complete cross-examination. Pointer v. Texas, 380 U.S. 400 (1969); Smith v. Illinois, 390 U.S. 129 (1968); Davis v. Alaska, supra and United States v. Bagley, supra.

In Smith v. Illinois, 390 U.S. 129 (1968), the United States Supreme Court reversed a state criminal conviction, wherein an informer testified, but his

true name and address were withheld from the defense which was not allowed to cross-examine on those areas. This inability to completely cross-examine the witness was found to violate the accused's right to confrontation where credibility of the witness was an issue. Furthermore, this Court found that a denial of the right to cross-examine constitutes constitutional error and no amount of showing of want of prejudice would cure it. Id. at 131, citing Brookhart v. Janis, 384 U.S. 1 at 3 (1966)[1]

[1]The Brookhart decision involved the denial of the Petitioner's right to cross and the Court noted that: "In this Court respondent admits that: '[If] there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it' [1-3] This concession is properly made. The Sixth Amendment provides that: 'In all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him....'" Brookhart, supra at 3

This Court recently cited Brookhart and Smith in United States v. Bagley, supra at 87 L. Ed.2d 481 at 491.

The Connecticut Appellate Courts recognized this right but, in effect, applied a "harmless error" test to uphold the Petitioners convictions. This is inappropriate in light of Bagley, supra, Smith, supra and Brookhart, supra, and is constitutionally erroneous. This Court has recently held that a direct restriction on the scope of cross-examination denies a criminal defendant his right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Bagley, supra at 87 L.Ed. 481 at 491 citing Brookhart v. Janis, supra and Smith v. Illinois, supra. Therefore, the application of the harmless error

test was Constitutionally impermissible.

CONCLUSION

For the reasons hereinbefore set forth, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully Submitted,

Ronald E. Cassidento, Esq.
543 Prospect Avenue
Hartford, CT 06105

Counsel for the Petitioner

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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APPENDIX

APPENDIX INDEX

	Page
Opinion of Connecticut Supreme Court State vs. Dominic F. Bruno, 197 Conn. 326 (September 3, 1985)	1A-11A
Order of Connecticut Supreme Court Denying Motion for Rehearing dated September 24, 1985.	12A

STATE OF CONNECTICUT *v.* DOMINIC F. BRUNO (12510)

PETERS, C. J., HEALEY, SHEA, SANTANIELLO and CALLAHAN, Js.

Convicted of six counts of the crime of eavesdropping, of one count of the crime of conspiracy to commit eavesdropping and of two counts of the crime of criminal mischief in the first degree, the defendant appealed to the Appellate Court. He claimed, inter alia, that the trial court's refusal to conduct an in camera inspection of the psychiatric records of a witness for the state, or to make those records available to defense counsel violated his constitutional right to conduct an effective cross-examination of that witness. The Appellate Court affirmed the convictions upon concluding that even without the testimony of that witness, which the trial court may have become obliged to strike because the witness refused to consent to an in camera inspection of her records, there was clearly sufficient evidence to prove the defendant's guilt beyond a reasonable doubt. On the defendant's appeal to this court following the granting of certification, the decision of the Appellate Court was affirmed.

Argued June 12—decision released September 3, 1985

Information charging the defendant with six counts of eavesdropping, one count of conspiracy to commit eavesdropping and three counts of criminal mischief in the first degree, brought to the Superior Court in the judicial district of Litchfield and tried to the court, *Borden, J.*, judgments of guilty on all but one count of criminal mischief in the first degree, from which the defendant appealed to the Appellate Court, *Dannehy, C.P.J., Hull* and *Dupont, Js.*, which affirmed the convictions, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Ronald E. Cassidento, for the appellant (defendant).

John M. Massameno, assistant state's attorney, with whom were *Linda N. Knight,* deputy assistant state's attorney, and, on the brief, *Austin J. McGuigan,* chief state's attorney, and *John Dropick,* assistant state's attorney, for the appellee (state).

CALLAHAN, J. This is an appeal, after certification, from an Appellate Court decision affirming the conviction of the defendant, Dominic Bruno, after a trial to the court, *Borden, J.*, of six counts of eavesdropping in violation of General Statutes § 53a-189, one count of conspiracy to commit eavesdropping in violation of General Statutes §§ 53a-48 and 53a-189, and two counts of criminal mischief in the first degree in violation of General Statutes § 53a-115. The defendant received an effective sentence of one year, execution suspended after six months, and two years probation, and was fined five hundred dollars. In his appeal to the Appellate Court, the defendant raised four claims of error, none of which the Appellate Court found persuasive. The present appeal concerns only one of these claims, namely, that the trial court's refusal to conduct an in camera inspection of the psychiatric records of a state's witness, or to make the records available to defense counsel, violated the defendant's right to conduct an effective cross-examination of the witness, as guaranteed by the sixth amendment to the United States constitution. We granted certification to review the decision of the Appellate Court finding no error. We affirm the decision of the Appellate Court.

The decision of the Appellate Court describes the underlying facts. *State* v. *Bruno,* 1 Conn. App. 384, 473 A.2d. 311 (1984). The defendant was accused of several instances of wiretapping and of engaging in acts of vandalism. The police investigation of the defendant was initiated by his former girlfriend, who reported

ducting an effective cross-examination of the witness, in violation of his constitutional right to confront the witnesses against him. Id., 390. After his appeal had been argued in the Appellate Court, but before that court rendered its decision, this court decided the case of *State* v. *Esposito,* 192 Conn. 166, 471 A.2d 949 (1984). In *Esposito,* we considered the question of when, if ever, a trial court or a criminal defendant should be permitted to inspect the psychiatric records of a state's witness to discover whether they contain relevant impeaching evidence. Id., 176–80. There we decided that "[t]he broad sweep of [General Statutes § 52-146e] covers not only disclosure [of a witness' psychiatric records] to a defendant or his counsel, but also disclosure to a court even for the limited purpose of an in camera examination." Id., 178. We then went on to articulate a procedure which would protect the witness' statutory right to confidentiality while simultaneously safeguarding the defendant's constitutional right effectively to cross-examine the witness. First, the defendant is required to make "a showing that there is reasonable ground to believe that the failure to produce the information is likely to impair the defendant's right of confrontation such that the witness' direct testimony should be stricken. Upon such a showing the court may then afford the state an opportunity to secure the consent of the witness for the court to conduct an in camera inspection of the claimed information and, if necessary, to turn over to the defendant any relevant material for the purposes of cross-examination. If the defendant does make such showing and such consent is not forthcoming then the court may be obliged to strike the testimony of the witness. If the consent is limited to an in camera inspection and such inspection, in the opinion of the trial judge, does not disclose relevant material then the resealed record is to be made available for inspection on appellate review. If the in camera inspection does reveal relevant material then

the witness should be given an opportunity to decide whether to consent to release of such material to the defendant or to face having her testimony stricken in the event of refusal." Id., 179–80.

The Appellate Court found that the preliminary showing, required under *Esposito*, "that the failure to produce the records was likely to impair the defendant's right to confront the witness against him" had been made. *State* v. *Bruno*, supra, 395. Citing *State* v. *Esposito*, supra, 179–80, the court acknowledged that "[s]ince the witness did not consent to a release of the records to anyone, including the [trial] court for an in camera review, the [trial] court 'may' have become obliged to strike the testimony of the witness." (Footnotes omitted.) *State* v. *Bruno*, supra. Upon review of the record and transcripts in the case, however, the Appellate Court found a clear showing "that the evidence offered by the state, even without the testimony of the witness, was sufficient to prove the defendant's guilt beyond a reasonable doubt." Id. The court therefore concluded that there was no error because "[e]ven if we assume, that the trial court would have, under the holding of *State* v. *Esposito*, supra, stricken the testimony of the witness, the defendant still would have been proven guilty beyond a reasonable doubt." Id.

In his request to this court for certification, the defendant raised two related issues.[1] The first concerns whether the trial court's refusal to grant the defend-

[1] The defendant's request to this court for certification was in the form of two statements and reads as follows: "The petitioner was denied his sixth amendment right to confront and to conduct an effective cross-examination of the state's primary witness against him as guaranteed by the sixth amendment to the United States constitution in that the witness' psychiatric records were not made available to his counsel and the trial court refused to make an *in camera* inspection of the subpoenaed records. The Appellate Court applied a 'harmless error test' in the violation of his basic constitutional right to confront witnesses, which right goes to the integrity of the fact finding process of determining guilt or innocence in violation of the

ant access to the witness' psychiatric records, or to inspect the records in camera, deprived the defendant of his sixth amendment right effectively to cross-examine the witness. The second issue is whether the Appellate Court erroneously applied a "harmless error test" in reviewing the rulings of the trial court with regard to the witness' psychiatric records.

In an appeal from the Appellate Court, "the focus of our review is not the actions of the trial court, but the actions of the Appellate Court. We do not hear the appeal de novo. The only questions that we need consider are those squarely raised by the petition for certification, and we will ordinarily consider these issues in the form in which they have been framed in the Appellate Court." *State* v. *Torrence,* 196 Conn. 430, 433, 493 A.2d 865 (1985).[2]

The first question raised by the defendant, as to whether his sixth amendment rights were violated by the denial of access to the witness' psychiatric records and the absence of an in camera inspection, is unanswerable. Because "the witness did not consent to a release of the records to anyone, including the court

guidelines set forth in *State* v. *Truppi,* 182 Conn. 449 [438 A.2d 712 (1980), cert. denied, 451 U.S. 941, 101 S. Ct. 2024, 68 L. Ed. 2d 329 (1981)]." (Emphasis in original.)

[2] Because we agree with the analysis and the decision of the Appellate Court, we decline to consider the alternate grounds for affirmance contained in the preliminary statement of issues filed by the state pursuant to Practice Book § 3012 (a). Thus, for the purposes of this appeal, we accept the Appellate Court's finding that the defendant made a sufficient showing under *State* v. *Esposito,* 192 Conn. 166, 179, 471 A.2d 949 (1984), "that the failure to produce the [witness' psychiatric] records was likely to impair the defendant's right to confront the witness against him." *State* v. *Bruno,* 1 Conn. App. 384, 395, 473 A.2d 311 (1984). We likewise need not review the Appellate Court's determination that "the evidence offered by the state, even without the testimony of the witness, was sufficient to prove the defendant's guilt beyond a reasonable doubt"; id.; because the defendant has not challenged this finding in the present appeal to this court. See *State* v. *Torrence,* 196 Conn. 430, 434, 493 A.2d 865 (1985).

for an in camera review"; *State* v. *Bruno,* supra, 395; the records are not "available for inspection on appellate review"; *State* v. *Esposito,* supra, 180; by either the Appellate Court or this court. Although the witness in fact testified extensively upon cross-examination by the defendant regarding her psychiatric treatment and hospitalizations, her alcoholism and drug use, her suicide attempts, and her feelings of fear and anger toward the defendant; *State* v. *Bruno,* supra, 392; absent any knowledge of the contents of her psychiatric records, it is impossible to determine whether they included relevant impeaching evidence that was not cumulative or was contrary to her testimony. To rely on the testimony actually elicited on cross-examination in assessing whether the defendant's sixth amendment rights were violated would involve pure speculation as to the contents of the witness' records. The Appellate Court properly did not engage in such a futile exercise, nor do we.

As the Appellate Court correctly noted, "[t]he claim here . . . is not that the defendant was restricted in any way in cross-examination, but that without examination of the psychiatric records of the witness the defendant's right to confrontation was impaired to such an extent that he was denied a fair trial." Id., 392. The Appellate Court rejected the defendant's claim on the ground that, even absent the witness' testimony, there was clearly sufficient evidence to prove the defendant's guilt beyond a reasonable doubt. Id., 395. This brings us to the second question raised by the defendant in his appeal to this court, that is, whether "[t]he Appellate Court applied a 'harmless error test' in the violation of his basic constitutional right to confront witnesses, which right goes to the integrity of the fact finding process of determining guilt or innocence in violation of the guidelines set forth in *State* v. *Truppi,* 182

Conn. 449 [438 A.2d 712 (1980), cert. denied, 451 U.S. 941, 101 S. Ct. 2024, 68 L. Ed. 2d 329 (1981)]."

In *State* v. *Truppi*, supra, this court reversed a defendant's convictions for robbery and kidnapping because the trial court's instructions had shifted to the defendant the burden of proof as to the intent element of those crimes in violation of his due process rights. Id., 466. Although the state urged that the error was harmless in light of the overwhelming evidence of the defendant's guilt; id., 465; we refused "to weigh the evidence of guilt against the uncured damage done by the harmful portion of the instructions"; id., 466; because such an analysis "would transfer to this 'court the jury's function of measuring the evidence by appropriate legal yardsticks.' " Id., quoting *Bollenbach* v. *United States*, 326 U.S. 607, 614, 66 S. Ct. 402, 90 L. Ed. 350 (1946). Compare *State* v. *Couture*, 194 Conn. 530, 563, 482 A.2d 300 (1984), cert. denied, U.S. , 105 S. Ct. 967, 83 L. Ed. 2d 971 (1985) (improper remarks by prosecutor during opening summation to jury required reversal of convictions despite "record that [did] not permit serious doubt of [the defendant's] guilt"); with *State* v. *Cohane*, 193 Conn. 474, 485, 479 A.2d 763, cert. denied, U.S. , 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984) (trial court's erroneous refusal to instruct jury that no adverse inference could be drawn from the defendant's failure to testify "may be held harmless only if the evidence against the accused is so overwhelming that we can conclude as a matter of law that the jury's verdict was not influenced by the absence of [the] instruction").

The defendant argues that the analysis applied by the Appellate Court conflicts with the established principle that "certain constitutional protections are so central to the requirement of a fair trial that their violation absolutely requires that the conviction from which they arose be set aside." *State* v. *Cohane*, supra, 484, citing

Chapman v. *California*, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705, reh. denied, 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967). The defendant cites two cases in which the United States Supreme Court stated that " 'a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart* v. *Janis*, 384 U.S. 1, 3 [86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966)]." *Smith* v. *Illinois*, 390 U.S. 129, 131, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968). A close examination of these cases reveals, however, that the defendant's reliance upon them is misplaced.

In *Brookhart* v. *Janis*, supra, the defendant's attorney informed the trial court "that the State need make only a prima facie showing of guilt and that he would neither offer evidence on [the defendant's] behalf nor cross-examine any of the State's witnesses." Id., 7. The Supreme Court overturned the conviction because the record failed to demonstrate that the defendant himself knowingly and intelligently agreed "to be tried in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him." Id. In *Smith* v. *Illinois*, supra, where the "only real question at the trial . . . was the relative credibility of the petitioner and [the principal] prosecution witness"; id., 130; the defendant was not permitted to ask the witness either his name or address. The Supreme Court held that "[t]o forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." Id., 131.

In *Brookhart* and *Smith*, each defendant demonstrated a clear violation of his constitutional right to confront and cross-examine the witnesses against him. As previously discussed, however, it is impossible to determine whether the defendant's right to cross-

examine the witness was impaired in this case absent an opportunity to review the witness' psychiatric records. It is to protect a defendant from the *possibility* of a violation of his confrontation rights that *State* v. *Esposito*, supra, contemplates striking the testimony of a witness who asserts the privilege of confidentiality in the face of a showing of likely impairment of those rights absent disclosure. Id., 179–80. In light of Esposito, because this defendant made the requisite preliminary showing, he would have been entitled to have the witness' testimony stricken upon her refusal to permit an in camera inspection. Thus, although the defendant cannot prove that he was deprived of his sixth amendment right to confront the witness, he can claim that her testimony should have been excluded from the evidence upon which his guilt was determined and that the procedure followed below was erroneous.

This court has previously applied the harmless error doctrine to uphold convictions, despite the erroneous admission of testimony at trial, where there was overwhelming evidence of the defendant's guilt. See, e.g., *State* v. *Brown*, 187 Conn. 602, 612, 447 A.2d 734 (1982); *State* v. *Briggs*, 179 Conn. 328, 336–37, 426 A.2d 298 (1979), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980); *State* v. *Zeko*, 177 Conn. 545, 557, 418 A.2d 917 (1979); *Palmer* v. *Adams*, 162 Conn. 316, 328, 294 A.2d 297 (1972); see also *Brown* v. *United States*, 411 U.S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973). In light of the Appellate Court's unchallenged finding that, even absent the witness' testimony, "the defendant still would have been proven guilty beyond a reasonable doubt"; *State* v. *Bruno*, supra, 395; we agree that the convictions should be sustained. We interpret the Appellate Court's finding to mean that, as a matter of law, the remaining evidence against the

defendant was so overwhelming as to render any error in not striking the complainant's testimony harmless beyond a reasonable doubt.

The decision of the Appellate Court is affirmed.

In this opinion PETERS, C. J., HEALEY and SANTANIELLO, JS., concurred.

SHEA, J., concurring. I agree with the majority's application in this case of the harmless error doctrine in the form appropriate for errors of constitutional import, i.e., harmlessness beyond a reasonable doubt. The opinion of the Appellate Court, however, appears to have employed a different standard: "A review of the record and transcripts in the present case, however, clearly demonstrates that the evidence offered by the state, even without the testimony of the witness, was sufficient to prove the defendant's guilt beyond a reasonable doubt." *State* v. *Bruno*, 1 Conn. App. 384, 395, 473 A.2d 311 (1984). This sentence, declaring that, even with the omission of the testimony that should have been stricken, the state's evidence was sufficient to prove guilt implies that the criterion used was whether the remaining evidence was sufficient as a matter of law to support the finding. Legal sufficiency of the evidence is not the test for harmless error even if only a nonconstitutional error is involved. The harmlessness of an error depends upon its impact on the trier and the result, not upon whether the particular evidence involved was legally essential to support the finding.

Applying the constitutional standard, I would find the evidence, absent the testimony of the witness who asserted her psychiatric privilege, to be so overwhelming as to render the error harmless beyond a reasonable doubt. The physical evidence, the tapes and the recording equipment clearly established the substance

of the crimes, and other witnesses provided more than ample evidence of the defendant's involvement in those crimes, including his own admissions. The testimony that should have been stricken was of some significance in explaining the defendant's motivation, but was otherwise merely repetitious of facts amply proved by physical exhibits or by other witnesses. The defendant was acquitted of the one charge upon which the testimony of this witness was of great significance, the theft of her jewelry.

Accordingly, I agree with the result.

No. 12510

STATE OF CONNECTICUT SUPREME COURT

v STATE OF CONNECTICUT

DOMINIC BRUNO September 24, 1985

ORDER

THE MOTION OF THE DEFENDANT FILED SEPTEMBER 10, 1985 FOR REARGUMENT HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

O R D E R E D DENIED.

BY THE COURT,
FRANCIS J. DRUMM, JR.
CHIEF CLERK

/s/ Carolyn G. Cunba
Assistant Clerk-Appellate

NOTICE SENT: 9-24-85
RONALD CASSIDENTO
JOHN DROPICK, A.S.A.
JOHN MASSAMENO, A.S.A.
LINDA KNIGHT, A.S.A.
HON. DAVID BORDEN
HON. NORRIS O'NEILL
HON. JAMES HENEBRY
CLERK, LITCHFIELD J.D.
(29892; 30059; 29935)
REPORTER OF JUDICIAL DECISIONS

Supreme Court, U.S.
FILED
DEC 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-886

In The

Supreme Court Of The United States

OCTOBER TERM, 1985

DOMINIC F. BRUNO,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

JOHN M. MASSAMENO
Assistant State's Attorney
Senior Appellate Attorney
Office of the Chief State's Attorney
Division of Criminal Justice
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373

Counsel of Record for Respondent

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QUESTION PRESENTED

Whether violation of the Sixth Amendment right of confrontation as to one witness may be rendered harmless beyond a reasonable doubt by the existence of overwhelming evidence of guilt.

STATEMENT OF THE CASE

After the Petitioner's state court trial, he was convicted of six counts of eavesdropping, and two counts of criminal mischief. Pet. App. at 2A. On appeal to the State Appellate Court and thereafter to the State Supreme Court, the Petitioner claimed that his confrontation rights were violated when, in accordance with Conn. Gen. Stat. § 52-146e (Rev. to 1979), the trial court did not permit him to examine the psychiatric records of a State witness prior to cross examination. The Connecticut Supreme Court assumed that the Petitioner's confrontation rights were thereby violated, but found that any such violation was harmless beyond a reasonable doubt based on other overwhelming evidence of guilt. Accordingly, the convictions were affirmed. Pet. App. at 10A.

REASONS FOR DENIAL OF THE PETITION

The limited question presented by the Petition for a Writ of Certiorari already has been resolved by this Court. In *Harrington v. California*, 395 U.S. 250, 253-54 (1969) and later in *Brown v. United States*, 411 U.S. 223, 254 (1973), this Court concluded that violations of the Sixth Amendment right of confrontation could be harmless beyond a reasonable doubt on the basis of overwhelming independent evidence of guilt. *See also Van Arsdale v. State*, 486 A.2d 1 (Del. 1984), *cert. granted sub nom. Delaware v. Van Arsdale*, 53 U.S.L.W. 3913 (U.S. June 25, 1985) (No. 84-1279) (government's petition for writ of certiorari granted to review State court's conclusion that Sixth Amendment violation could not be harmless).

The principle that the Petitioner challenges having been firmly established in this Court, the only question that remains is whether it was correctly applied below. Surely this Court's resources ought not to be spent in resolving questions wholly dependent on unique factual contexts. *See Wolfe v. North Carolina*, 364 U.S. 177, 196 (1960); *United States v. Johnston*, 268 U.S. 220, 227 (1925).

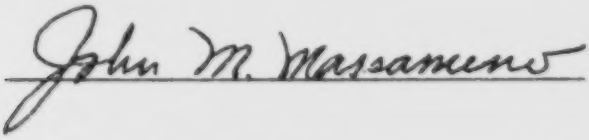
CONCLUSION

For these reasons, the State of Connecticut urges this Court to deny the petition.

Respectfully submitted,

THE RESPONDENT
STATE OF CONNECTICUT

JOHN J. KELLY
Chief State's Attorney



By:

JOHN M. MASSAMENO
Assistant State's Attorney
Senior Appellate Attorney
Office of the Chief State's Attorney
Division of Criminal Justice
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373

Counsel of Record for Respondent